No. 87-746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL H. and VICTORIA D.,
Appellants,
vs.
GERALD D.,
Appellee.

ON APPEAL FROM THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND ACLU FOUNDATION OF SOUTHERN CALIFORNIA IN SUPPORT OF APPELLANTS

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MOTION OF THE AMERICAN CIVIL LIBERTIES FOUNDATION AND ACLU FOUNDATION OF SOUTHERN CALIFORNIA FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT

The American Civil Liberties Union Foundation and the ACLU Foundation of Southern California respectfully move for leave to file the attached brief Amici Curiae in support of Appellants Michael H. and Victoria D.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members, dedicated to the protection of the fundamental rights of the people of the United States. The ACLU of Southern California (ACLU/SC) is one of the affiliates of the ACLU with approximately 25,000 members in the Southern California area. The ACLU/SC filed an amicus curiae brief in this case in support of appellants before the California Court

of Appeal.

This case raises important issues involving the state's power to regulate complex relationships between parents--biological or otherwise--and children consistent with the constitutional guarantees of due process and equal protection. The ACLU has long been involved in litigation and other activities concerning these issues. Amici believe that the State of California has transgressed the constitutional limits on its authority by severing the relationship of an unwed biological father and his daughter, without affording any opportunity to assert or defend the strength of the parental or filial interests involved. In doing so, through Evidence Code § 621, in the circumstances of this case, the State has denied appellants due process

and equal protection of law. This brief addresses the due process concerns raised by the State's determination to sever the parent-child relationship pursuant to Evidence Code §621.

Appellants have consented to the filing of this brief amici curiae. However, the Appellee has declined to grant consent.

DATED: May 5, 1988

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Miscellaneous

STATEMENT OF THE CASE

Amici adopt the facts as set forth at pages 11 to 13 of the Appellants' Jurisdictional Statement.[1] Certain key facts are highlighted below.

There is significant evidence in the record that appellant Michael H. is the biological father of appellant Victoria D. This evidence includes the results of a blood test showing a 98.07 percent probability that Michael is Victoria's biological father and statements from Carole D., the biological mother, that Michael is the biological father.

Moreover, Victoria and Michael had developed a warm, nurturing parent-child

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[1] This case was resolved below in the context of summary judgment. The facts, therefore, should be viewed in the light most favorable to appellants. Thus, it must be assumed that Michael would be able to prove that he is the biological father of Victoria at trial.

relationship before the trial court's order severed their relationship. For a period of three months in 1982 and a period of nine months in 1983 and 1984, Michael, Carole and Victoria lived together as a family during Carole's estrangement from her husband, Gerald D. The child Victoria thus spent nearly one year of the first three years of her life in an explicit child-parent relationship with Michael. Victoria regarded Michael as her father and received from him parental support and affection. An expert's report confirmed that Michael and Victoria established a parent-child relationship during this important formative period. Jurisdictional Statement ("Jur. St."), at 13, n.2.

Michael maintained a close bond with his daughter even after Carole returned to Gerald in the spring of 1984.

Initially, the parties agreed to maintain this relationship between Michael and Victoria through a three-year unsupervised visitation by Michael with his daughter that commenced in November 1984. This agreement was entered as an order of the court. Through her guardian, Victoria was a party to the agreement which recognized the sustaining nature of Michael's relationship with her. An October 1984 expert's report found that Michael was "the single adult in Victoria D.'s life most committed to caring for her needs on a long term basis...," (Jur. St., at 13, n.2), and that continuing the parental relationship between Michael and Victoria was in the child's best interests. The record in no way suggests that continuation of such unsupervised visitation would unduly upset the marital family in which

Victoria now resides.[2]

Nevertheless, on January 28, 1985, the trial court dismissed Michael's Petition for Declaration of Paternity and the Guardian Ad Litem's Declaration of a Parent-Child Relationship based upon the conclusive presumption in California Evidence Code § 621[3] which operated to vest parental rights in Gerald to the complete exclusion of Michael. The effect of the trial court's order was not only to prevent Michael from establishing paternity but also to preclude visitation under California

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[2] As a state court judge noted in the highly publicized Baby M case, "Melissa is a resilient child who is no less capable than thousands of children of broken marriages who successfully adjust to complex family relationships when their parents remarry." In the Matter of Baby M, FM-25314-86E (April 6, 1988), at 3.

[3] Evidence Code §621 is set forth in full in the Appendix to this brief.

Civil Code § 4601.[4] Michael and Victoria were thus barred from continuing a parent-child relationship -- considered important to Victoria and in the child's best interest -- even under terms which did not unduly interfere with the current relationship between Carole and her husband.

This decision was affirmed by the California Court of Appeal on the ground that the state's interest in the sanctity of the family outweighed any

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[4] California Civil Code § 4601 provides:

> Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the Court, reasonable visitation rights may be granted to any person having an interest in the welfare of the child.

rights Michael or Victoria had in these circumstances. The California Supreme Court declined to review this decision.

Significantly, Michael does not seek to remove Victoria from her home with Gerald and Carole. Nor does he seek to displace Gerald as a father to Victoria. What Michael has sought is the right to continue a relationship with Victoria through court awarded visitation rights and to provide support for her needs. Victoria, through her guardian, seeks the same relief.

SUMMARY OF ARGUMENT

This case involves the right of an unwed father to continue a loving, supportive relationship with a child who was born during the marriage and cohabitation of the mother to another man. Subsequent to the child's birth, Michael lived with his daughter Victoria

and her mother Carole as a family unit. During that period, Michael provided support for Victoria, gave her love and attention, and acquired a psychologically and emotionally significant place in her life. In equal measure, Victoria provided Michael with meaning and happiness. She treated him as a father and benefited from his nurture and care. The child's mother subsequently returned to her husband. Even after the non-marital family dissolved, Michael maintained a warm, mutually-supportive relationship with his daughter. Through unsupervised visitation -- approved by all parties and entered as an order of the court -- Michael assumed the role of non-custodial parent. Subsequently, Michael sought to formalize his relationship with his daughter and sought an adjudication of paternity and rights

of visitation.

Without considering the strength of the parent-filial relationship or the child's best interests, California Evidence Code § 621 simply extinguished the natural father's parental rights and barred him from any continuing relationship with his daughter. The statute provided Michael no opportunity to demonstrate the depth of his parental commitment to Victoria. Nor did the statute allow the child's interest in visitation or support to be meaningfully heard.

This Court has long recognized that the "relationship between parent and child," Quilloin v. Wolcott, 434 U.S. 246, 255 (1978), is an "intrinsic human right," Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 845 (1977), and therefore

"constitutionally protected." Quilloin v. Wolcott, 434 U.S. at 255. Accordingly, where an unwed father has demonstrated parental commitment to his child, only "powerful countervailing interests" on the part of the State may justify interference with the fundamental parental rights that have developed over time. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

Certainly no powerful countervailing interest is present in this case. To be sure, the State may have a legitimate interest, as asserted here, in the "integrity of the matrimonial family." Jur. St., at B16. However important this interest may be in the abstract, it cannot in the circumstances of this case justify the wholesale termination of the loving and supportive relationship that exists between Victoria and her natural

father Michael. The California courts were able to conclude otherwise only by ignoring the powerful parent-filial interests at stake and by giving no weight whatever to the best interests of the child.

This Court has shown far greater respect to the rights of an unwed father and his child where the pair have developed over time a loving and supportive parent-filial relationship. See Stanley v. Illinois, 405 U.S. at 645. So fundamental is the parent-child relation that this Court has subjected countervailing state interests and the statutory schemes that advance those interests to greater scrutiny than mere rationality. See Caban v. Mohammed, 441 U.S. 380 (1979). Such scrutiny is particularly appropriate where, as here, the challenged statute does not even

achieve the purported state goal. Here, while claiming to promote the child's welfare within the marital family, § 621 fails to provide the child with a stable familial environment. To the contrary, the challenged statute instead permits the marital father to avoid his support obligations by disclaiming paternity, thus leaving the child in uncertainty. By contrast, the natural, non-custodial father is denied any opportunity to provide love and financial support to his child.

The challenged statute underscores the vices of irrebuttable presumptions when used to resolve sensitive issues implicating fundamental rights such as the parent-child relationship. Evidence Code § 621 makes no attempt to balance the competing constitutional interests at stake, thereby ignoring the best

interests of the child in favor of a theoretical model of the nuclear marital family.[5] Where fundamental rights are at stake, this Court has strongly disfavored the use of irrebuttable presumptions. As a matter of due process, the application of Evidence Code § 621 to terminate the significant parent-child relationship that exists between Michael and Victoria cannot stand.

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[5] This case does not involve a situation in which no father is willing to support a child. Here both fathers offer support to Victoria. The validity of a conclusive presumption of paternity in a husband where it was the only means of guaranteeing support for the child might be sustained as serving a compelling state interest. However, this statute offers the husband a way of opting out of this responsibility while excluding biological fathers who wish to support their children.

ARGUMENT

I. The Application of Evidence Code Section 621 To Terminate Completely Any Ongoing Relationship Between Appellants Michael and Victoria Denied Appellants Due Process of Law

A. Appellants Have A Fundamental Right To Maintain Their Parent-Child Relationship

This Court's decisions have recognized that the parent-child relationship -- even in a non-traditional context -- implicates fundamental interests worthy of special protection from state interference. Stanley v. Illinois, 405 U.S. 645 (1972) (rights of unwed father not to be deprived of his children after death of mother). See also Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978).

In Stanley, this Court struck down

as violative of due process an Illinois statute that deprived an unwed father of custody of his biological children by defining the term "parent" to include only the mother of a child born out-of-wedlock. This Court described the fundamental interests at stake in the following terms:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.

405 U.S at 651 (citations omitted). See also Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Santosky v. Kramer, 455 U.S. 745, 757 (1982) ("Freedom of choice in matters

of family life is a fundamental liberty interest.") Thus, as this Court recently confirmed in an analogous context,

> Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.

Roberts v. U.S. Jaycees, 468 U.S. 609, 619-20 (1984).

Outside the marital context, however, "parental rights do not spring full-blown from the biological connection between parent and child," Lehr v. Robertson, 463 U.S. at 260, quoting Caban v. Mohammed, 441 U.S. at 397, but rather require demonstration of the "full commitment to the responsibilities of parenthood." Lehr, 463 U.S. at 261. See also Quilloin v. Walcott, 434 U.S. at

256. In determining the strength of an asserted constitutional liberty interest to be protected in the non-marital context, this Court has therefore focused on whether the biological parent has developed a substantial relationship with the child. Thus, a biological father who lacks any significant custodial, personal or financial relationship with his child cannot belatedly claim a right to establish such a relationship years after the childbirth. Lehr v. Robertson, 463 U.S. at 262.

Here, Michael is not only the natural father of Victoria but also has contributed to her well-being and growth. Both as a custodial and non-custodial parent, Michael has shown love and affection for his daughter; he has participated in decisions affecting her

development and welfare; and he has contributed financially to her support. Victoria, in turn, has come to regard Michael as a father she loves, a person whose continued affection and attention are essential to her growth and stability. Appellants' interest in continuing this critical relationship is thus based on biological connection as well as affective bonds that have developed over time. Appellants assert a right to continue to play an important role in each other's life: They are connected through biology, emotion and mutual support.

As this Court underscored in Lehr v. Robertson:

> When an unwed father demonstrates full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child

> requires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children."

463 U.S. at 261 (citation omitted). Here, Michael's nurturing activities during the important, early years of Victoria's life, combined with his readiness to provide financial support, demonstrate a "full commitment to the responsibilities of parenthood" that this Court has found critical in according constitutional protection to the parent-child relationship. That this relationship occurs outside the traditional marital context does not extinguish the liberty interests at stake. To the contrary, this Court's decisions recognize the fundamental right of a child to maintain a relationship with his or her natural father in situations departing from the

traditional nuclear model. As the Court observed in Stanley:

> Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bounds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit.

405 U.S. at 651-52, citing Levy v. Louisiana, 391 U.S. 68 (1968). See also, Santosky v. Kramer, 455 U.S. at 754 n. 7 ("The fact that important liberty interests of the child ... may also be affected..."); Rotary International v. Rotary Club of Duarte, 107 S.Ct. 1940, 1946 (1987)("We have not held that constitutional protection is restricted to relationships among family

members..."). Similarly, this Court has recognized that an unwed father who engages in regular visitation with a biological child "may have a relationship with his children fully comparable to that of the mother." Caban v. Mohammed, 441 U.S. at 389.

In Franz v. United States, 707 F.2d 582 (D.C. Cir. 1983), the Court of Appeals stressed the reciprocal and mutually reinforcing interests of a non-custodial parent and his children in continuing a parent-child relationship after this relationship was terminated by virtue of the federal witness protection program. The Franz Court's description of these interests is especially pertinent to this case:

> ...a parent's right to the preservation of his relationship with his child derives from the fact that the parent's achievement of a rich

> and rewarding life is likely to depend significantly on his ability to participate in the rearing of his offspring. A child's corresponding right to protection from interference in the relationship derives from the psychic importance to him in being raised by a loving, responsible, reliable adult.
>
> * * *
>
> Moreover, there is considerable evidence that the emotional stability of children of divorced parents is often tied to the quality of their continuing relationships with their non-custodial parent. On this point, in short, it appears impossible to say with any confidence that the concerns that underlie our willingness to accord "fundamental" status to parent-child bonds are any less telling when the relationship in question consists of mere "visitation."

Id. at 599, 601. This general observation in Franz is affirmed in this case by the expert's opinion that Victoria's interests would be best served by continuing her relationship with

Michael through regular visitation. Jur. St., at 13 n.2.

These principles confirm that appellants' interests in sustaining their parent-child relationship are fundamental and thus come before the Court with the same "momentum for respect" recognized in Stanley and Caban. Unlike Lehr or Quilloin, where the biological fathers made little, if any, effort to offer emotional or financial support to their children, Michael has consistently provided Victoria with sustenance and care. Where the father had only an "inchoate relationship with a child whom he has never suppported and rarely seen," Lehr, 463 U.S. at 249, this Court found no constitutional bar to allowing adoption of the children by men who evidenced willingness to accept parental

responsibility.

In Quilloin the biological father visited the child on "many occasions" and provided gifts "from time to time" but provided support only on an irregular basis. 434 U.S. at 251. Significantly, the trial court in Quilloin made a finding after a hearing that the proposed adoption and severance of the biological father's legitimation and visitation rights was in the child's best interests. Id.

The record here, by contrast, shows an intensity and commitment in the relationship between Michael and Victoria, recognized by a court appointed expert: Michael was found to be "the single adult in Victoria's life most committed to caring for her needs on a long-term basis...." Jur. St., at 13, n.2. Michael has held himself out to

Victoria as a father and has provided and offered his daughter financial support for the rest of her life. They have developed a caring relationship over time with all the attributes of parent-child love. The trial court's automatic application of Evidence Code § 621 has thwarted Michael's prodigious efforts to maintain this relationship with a daughter who loves him and needs his attention and care.

Not surprisingly, Victoria, through her guardian, seeks to maintain her relationship with Michael. This is not a merely theoretical claim founded on economic need. Victoria's guardian has asserted this position based on the expert's finding that it is in Victoria's best interests to maintain the affective bond she has developed with her biological father. This recommendation

is based on the observation of Victoria's actual interactions with Michael--interactions which provide "warmth and comfort" to both of them. Jur. St., at 13, n.2.

Genuine, loving bonds between parents and children are precisely the kind of relationship to which this Court has accorded the highest level of protection. The bond between Michael and Victoria is especially deserving of their protection.

B. The Asserted Interests Supporting the Conclusive Presumption in Evidence Code Section 621 Are Insufficient To Justify The Termination of Appellants' Parent-Child Relationship

In this case Evidence Code § 621 was found by the California courts to require the termination of any continuing relationship between Michael and

Victoria.[6] The lower courts found that the state interest in preserving the family unit of Gerald, Carole and Victoria outweighed the interests of appellants in continuing their relationship, even through visitation rights alone.

The California Court of Appeal acknowledged that Michael's interests in these circumstances were "substantial," Jur. St., at B15, and that he had established an "affectional relationship with Victoria almost since her birth." Jur. St., at B16. Nevertheless, the Court of Appeal determined that "the state's interest in preserving the integrity of the matrimonial family is so

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[6] The conclusive presumption in § 621 was found to apply based on evidence adduced by Gerald and Carole that they were cohabiting at the time of Victoria's conception and birth and that Gerald was not impotent or sterile. See § 621(a).

significant that it outweighs most other interests." Id. at B16. Moreover, the court held that Michael's "private interest in establishing a biological relationship in a court of law is overridden by the substantial state interests in familial stability and the welfare of the child." citing Michelle W. v. Ronald W., 39 Cal.3d 354, 216 Cal.Rptr. 748 (1986). Id. at B17. Any interests Victoria had in continuing her relationship with Michael were found to be overridden by this same state interest. Id. at B17-18.[7]

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[7] The Court of Appeal also found that the state interest in protecting Victoria from being branded as "illegitimate" also supports the statute. Id. at B18. In light of this Court's decisions in this area this argument cannot sustain the infringement of appellants' substantial interests. Levy v. Louisiana, supra; see also, Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly

The state may indeed have a legitimate interest in protecting families that conform to the traditional nuclear model. Stanley, 405 U.S. at 652. This interest, however, would not bar a biological father from visiting a child after divorce has dissolved a marital unit. A biological father in the non-marital context has a similar constitutionally-protected right to maintain a relationship with his child. This fundamental liberty interest cannot be overridden by the state's mere assertion that children are best protected within the sanctity of marriage. Indeed, Evidence Code § 621 does not even promote that state goal. To the contrary, by permiting the marital father to escape his support obligation

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or indirectly, give them effect.")

by disclaiming paternity within two years of the birth of the child, the statute gives no assurance that the mother's marriage will create a permanent and stable environment for the child. At the same time, a biological father who wishes to love and support his child, while respecting the mother's marital union, is prevented from doing so unless the mother joins in the motion under § 621(d).

The state's interest in giving an absolute and exclusive preference for the "matrimonial family" is also compromised where, as here, the statute works to the detriment of the child. The effect of § 621 is to deprive Victoria of an important, sustaining relationship with Michael -- a relationship regarded by her guardian to be in the child's best interests. This Court has repeatedly

protected the best interests of the child, whether the decision has been in favor of the biological parent -- as in Stanley and Caban -- or against the biological parent -- as in Lehr and Quilloin. In this case, by contrast, the California courts simply ignored the best interests of the child -- indeed § 621 does not even permit the child, through a guardian, to adjudicate paternity, demand support, or claim rights of visitation. Absent from the decision below is any indication that Victoria sought to continue her relationship with Michael, through visitation, even without an adjudication of paternity under § 621. Victoria's claim for continued visitation under this provision was clearly before the California courts yet was ignored altogether in the proceedings below.

C. The Irrebuttable Presumption in § 621 Cannot Be Sustained As A Constitutionally Appropriate Means of Effectuating Any State Interest In The "Integrity of the Matrimonial Family"

Even if the state's interest in the "integrity of the matrimonial family" may in certain circumstances overcome a natural father's claim to a continued parent-child relationship, the use of an irrebuttable presumption to further this interest is constitutionally defective. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639, 643-647 (1979); Weinberger v. Salfi, 422 U.S. 749 (1975); U.S. Department of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441, 446-453 (1973); Stanley v. Illinois, 405 U.S. at 649-658; Bell v. Burson, 402 U.S. 539 (1971).

This case is a perfect illustration of the vices of irrebuttable

presumptions. See generally, Tribe, American Constitutional Law (2d ed., 1988) at 1618-25. Though the protection of the traditional family unit is an important state interest, the weight to be accorded to this interest in any given situation varies with the strength of the countervailing individual interests. The conclusive presumption in § 621 avoids these mandatory constitutional balances by giving an absolute preference to parents in a family unit sanctified by a marriage contract.

The individual interests affected in these circumstances, however, are too fundamental to be resolved by conclusive presumption. U.S. Department of Agriculture v. Murry, 413 U.S. at 518-19 (Marshall, J., concurring)(The Constitution sometimes "requires the Government to act on an individualized

basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices").

In considering the constitutionality of irrebuttable presumptions, this Court has recognized a clear distinction between statutes "regulating purely economic matters," Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), and those affecting interests which enjoy "constitutionally protected status." Weinberger v. Salfi, 422 U.S. 749, 772 (1975). Where fundamental interests are at stake, the use of conclusive presumptions continues to be constitutionally suspect. See Franz v. United States, 707 F.2d at 606 n.102 ("The Court has made clear however, that [the irrebuttable presumption] doctrine remains viable when fundamental rights are at stake").

In Turner v. Department of Employment Sec., 423 U.S. 44 (1975) (per curiam), the Court struck down a provision of Utah law which makes pregnant women ineligible for employment benefits for a period extending from 12 weeks before the expected date of childbirth until a date six weeks after childbirth. The statute's "incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid...." Id. at 46.

Evidence Code § 621, as applied, creates an irrebuttable presumption against an unwed father in an area that clearly implicates the constitutionally protected right of "freedom of personal choice in matters of family life," Santosky, 455 U.S. at 753. It is, of course, easier for the state to make

paternity determinations by means of a conclusive presumption.[8] As this Court emphasized, however, in Stanley v. Illinois, supra:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

405 U.S. at 656. See also Vlandis v. Kline, 412 U.S. 441, 451 (1979).

This Court has upheld irrebuttable presumptions in commercial contexts, see Weinberger v. Salfi, 422 U.S. at 749 (1975). It has not done so, however,

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[8] Evidence Code § 621 allows the mother and her husband an individualized opportunity to adjudicate paternity, while denying the biological father and child a comparable opportunity.

where the irrebuttable presumption curtailed "important liberties cognizable under the Constitution." Id. at 785. The liberties asserted by Michael and Victoria in this case are precisely the kind of fundamental rights which this Court has found too important to be curtailed by irrebuttable presumptions. The state lacks any basis for assuming that in all cases the best interests of a child will be served by barring contact with a biological father with whom a warm and loving relationship has already been established. Appellants should be free to convince the trial court that Michael has demonstrated commitment to parental responsibilities on behalf of Victoria, and that it is in Victoria's best interests to maintain a parental relationship with the biological father whom she loves.

CONCLUSION

For the above-stated reasons, California Evidence Code § 621 should be found unconstitutional as applied in the circumstances of this case. Appellants should be permitted to maintain their parent-child relationship on such terms as the trial court determines are in Victoria's best interests.

DATED: May 5, 1988

Respectfully submitted,

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APPENDIX

APPENDIX

California Evidence Code § 521 provides:

> (a) Except as provided in subdivision (b), the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be child of the marriage.
>
> (b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.
>
> (c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.
>
> (d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit

with the court acknowledging paternity of the child.

(e) The provisions of subdivision (b) shall not apply to any case coming within the provisions of Section 7005 of the Civil Code or to any case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.

(f) The notice of motion for the blood tests pursuant to subdivision (b) shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court. This requirement shall not apply to any case pending before the court on September 30, 1980.

(g) The provisions of subdivision (b) shall not apply to any case which has reached final judgment of paternity on September 30, 1980.